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In the Supreme Court of the United States

OCTOBER TERM, 1980

GERALD J. THOMPSON, ETC., ET AL., PETITIONERS

v.

MAVIS BERRY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1a. In 1975, Congress amended the Aid to Families with Dependent Children ("AFDC") program to require that each state that chooses to participate

in the AFDC program must operate a Child Support and Establishment of Paternity program pursuant to an approved plan. See 42 U.S.C. 602(a)(27) and Title IV-D of the Social Security Act, 651 *et seq.* The child support program is designed to "enforc[e] the support obligations owed by absent parents to their children, [to] locat[e] absent parents, [to] establish[] paternity, and [to] obtain[] child support." 42 U.S.C. 651. Like the AFDC program itself, the child support program provides substantial federal reimbursement to participating states on a matching funds basis. 42 U.S.C. 655.

In order to provide a legal basis for enforcing support obligations and establishing paternity under the child support program, each applicant for or recipient of AFDC benefits must assign to the state any rights he may have to receive support from any other person. 42 U.S.C. 602(a)(26). All support payments covered by an assignment must be made to the state's child support agency. See 42 U.S.C. 654(5); 45 C.F.R. 302.32(a).[1] The state, in turn, must enforce any support obligations that have been assigned to it, and must undertake to obtain child support and to establish paternity in the case of children born out of wedlock. 42 U.S.C. 654(4). Concomitantly, AFDC applicants and recipients must, in order to retain AFDC eligibility, "cooperate" with the state with regard to paternity and child support matters. 42 U.S.C. 602(a)(26). In particular, regulations promulgated by the Secretary of Health and Human Services provide that the applicant's or recipient's duty to cooperate includes the duty to "[p]ay[] to

[1] Generally, support payments made to the state do not affect the level of AFDC benefits, but rather offset the state's AFDC costs.

the child support agency any child support payments received from the absent parent after an assignment" of those support rights has been made to the state. 45 C.F.R. 232.12(b)(4). If an AFDC recipient or applicant fails to cooperate with the state, the recipient or applicant is ineligible for AFDC benefits unless he demonstrates "good cause" for the failure to cooperate (45 C.F.R. 232.12(a), 232.40-232.49), and any aid to which his child is entitled must be provided in the form of protective payments (45 C.F.R. 234.60).

b. The State of Washington participates in the AFDC and Child Support Enforcement programs pursuant to approved State plans.[2] The State's regulations require AFDC applicants and recipients to provide information concerning support payments owed to or received by them, and immediately to remit support payments that they receive directly to the State's Office of Support Enforcement. Wash. Admin. Code § 388-14-200(2)(d) (1975) (reprinted at Pet. App. 42). Failure to comply with these regulations constitutes lack of cooperation and results in ineligibility for AFDC assistance and protective payments to the recipient's or applicant's children. Wash. Admin. Code § 388-14-200(3) (1975). Under Wash. Admin. Code § 388-14-200(4) (1975), an applicant or recipient who has failed promptly to submit direct support payments to the Office of Support Enforcement and who is therefore ineligible for AFDC benefits may enter into a written agreement with the State to remit the support payments in monthly installments of not less than 10% of the support payments that were improperly retained. If, however,

[2] Although HHS generally approved the State's plan, it did not approve the State's regulations at issue in this case.

the applicant or recipient thereafter fails to make a monthly payment required by the agreement or promptly to remit any other direct support payment, he can reestablish his eligibility only by repaying the entire amount of support payments in question. Wash. Admin. Code § 388-14-200(4) (1975).

2. In 1977, respondents filed this suit in the Superior Court of King County, Washington, challenging the State's regulations regarding AFDC recipient and applicant "cooperation." On November 14, 1978, the court granted respondent's motion for summary judgment. The court held that the State's policy of withholding the applicant's or recipient's benefits and of paying the remaining portion of the AFDC grant to a protective payee whenever a recipient or applicant failed to turn over support payments to the Office of Support Enforcement violates the Social Security Act, the federal regulations, and the Equal Protection and Due Process Clauses of the state and federal constitutions (Pet. App. 9-20). Accordingly, the court enjoined (Pet. App. 21-26) petitioners from enforcing Wash. Admin. Code § 388-14-200 (1975).

On appeal, the Supreme Court of Washington reversed in part and affirmed in part (Pet. App. 27-34). The court concluded that Sections 388-14-200 (2)(d) and (3) of the State's regulations, which provide for deletion of the benefits of a non-cooperating applicant or recipient and protective payment of the remaining AFDC benefits, are consistent with the Social Security Act and the applicable federal regulations and do not violate either the State or United States Constitution. The court held, however, that Section 388-14-200(4) is void because it establishes an additional requirement of eligibility for AFDC

benefits not provided in and inconsistent with the Act and the Secretary's regulations (Pet. App. 31-33). The court pointed out that "the harsh provision of the [State's] rules requiring immediate repayment of the full amount [of the support payment] most often makes it impossible for the recipient to regain eligibility" (*id.* at 33). Similarly, the court described the State's 10% repayment agreement rule as a "cruel regulation * * * tantamount to an adhesion contract in its most oppressive form" (*ibid.*).

3. Petitioners challenge the ruling of the Supreme Court of Washington holding invalid certain aspects of the State's AFDC child support payment regulations. But petitioners acknowledge that their "sole objective has been to attempt to satisfy applicable federal requirements entitling the state to federal financial participation" in the AFDC program (Pet. 6). They further explain that, in the absence of a "final binding statement" by the Secretary, they are uncertain how to comply with the decision below (*id.* at 7). On March 27, 1981, however, the Social Security Administration and Office of Child Support Enforcement of the Department of Health and Human Services jointly issued Action Transmittal No. 81-7, reprinted at App., *infra*, 1a-18a, which governs the treatment of assigned child support payments received directly and retained by AFDC applicants and recipients. This HHS policy statement, which has been approved by the Secretary, describes in detail the appropriate procedures and practices to be followed by petitioners and, in particular, directs that a "repayment schedule must be reasonably related to the recipient's income and resources" (App., *infra*, 14a). In light of this development, petitioners' "sole objective" has been satisfied and this case presents no recurring issue warranting this Court's review.

In any event, the decision of the court below, which petitioners recognize involves an issue of "first impression" (Pet. 8), is correct and does not warrant further review. The State's 10% repayment schedule requirement and full repayment on default policy fail to take into account the applicant's or recipient's income and resources and the size of the debt. These inflexible and harsh rules could preclude an individual from ever cooperating under 42 U.S.C. 602(a)(26) and 45 C.F.R. 232.12(b)(4) and are thus inconsistent with the remedial purposes of the Act (see 42 U.S.C. 601), as well as the specific HHS Action Transmittal referred to above. Hence, as the Supreme Court of Washington concluded, the State's regulations impermissibly impose stricter and different standards of eligibility for AFDC recipients and applicants who have failed to cooperate than those established by the Act and the Secretary's regulations. See *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971); *King* v. *Smith*, 392 U.S. 309, 333 (1968).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

APPENDIX

DEPARTMENT OF HEALTH AND
HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF FAMILY ASSISTANCE
WASHINGTON, D.C. 20024
AND
OFFICE OF CHILD SUPPORT ENFORCEMENT
ROCKVILLE, MD 20852

Program Instruction

ACTION TRANSMITTAL
SSA-AT-81-7 (OFA)
OCSE-AT-81-7
March 27, 1981

TO: STATE AGENCIES ADMINISTERING PUBLIC ASSISTANCE PLANS APPROVED UNDER TITLE IV-A AND CHILD SUPPORT ENFORCEMENT PLANS APPROVED UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT AND OTHER INTERESTED ORGANIZATIONS, AGENCIES AND INDIVIDUALS

SUBJECT: Treatment of Assigned Child Support Payments Received Directly and Retained by AFDC Applicants or Recipients

REFERENCES: Section 402(a)(26) of the Social Security Act, 45 CFR 232.11, 232.12, 233.20(a)(1), (3), and (12), 302.31, 302.32, and SSA-AT-78-31 (OFA), issued August 4, 1978

PROGRAM APPLICABILITY: AFDC and Child Support Enforcement

EFFECTIVE DATE: Upon issuance

PURPOSE: The purpose of this Action Transmittal is to provide joint Federal policy and procedures for handling situations in which AFDC applicants or recipients receive and retain child support payments from an absent parent when there is a valid assignment under 45 CFR 232.11.

DEFINITION: For purposes of this Action Transmittal, the following definitions apply: (1) "direct payment" means a child support payment from an absent parent covered by an assignment to the State under 45 CFR 232.11 which is received directly by an AFDC applicant or recipient. (2) "IV-A income State" means a State in which retained direct payments are treated as income by the IV-A Agency. (3) "IV-D recovery State" means a State in which retained direct payments are subject to recovery by the IV-D agency under its responsibility to secure support from legally liable persons as required by 45 CFR 302.31(a)(2).

BACKGROUND: Although most child support paid by absent parents on behalf of AFDC recipient children is paid by these parents to IV-D agencies, there are situations in which applicants or recipients of AFDC receive these payments directly from the absent parent. For example, in some States the court order establishing the child support obligation must be changed before the absent parent can be required under the assignment to pay the child support to the IV-D agency rather than to the family. Until this change can be made, the family may continue to receive the support payments. In recognition of the possibility of direct payment situations, Federal regulations at 45 CFR 232.12(b)(4) require that, as a

condition of cooperation in obtaining support, an applicant or recipient must pay to the IV-D agency "any child support payments received from the absent parent after an assignment under § 232.11 has been made."

While the applicant's or recipient's responsibility with respect to direct payments is clear under Federal regulations, there have been numerous questions from both IV-A and IV-D agencies as to the appropriate action to take when the applicant or recipient fails to turn over direct payments as required. In order to answer these questions, the Office of Family Assistance (OFA) and the Office of Child Support Enforcement (OCSE) have developed this joint instruction.

Both OFA and OCSE wish to emphasize the importance of interagency cooperation between IV-A and IV-D agencies at all levels with respect to direct payment situations. Prompt action and effective communication on the part of both agencies is essential if problems related to direct payments are to be minimized.

CONTENT: I. GENERAL STATEMENT OF POLICY

States have repeatedly asked whether the language of 45 CFR 232.12(b)(4), which provides that cooperation in obtaining support includes "paying to the child support agency any [assigned] child support payments received from the absent partner . . . ," requires recipients to remit direct payments received and retained in the past as well as those received in the current period. It is the position of OFA and OCSE that this cooperation requirement applies to

all direct payments that have not been counted as income by the IV-A agency, including those which may have been received and retained by a recipient in the past.

Research by both OFA and OCSE indicates that there are essentially two methods being used by the States to handle cases in which direct child support payments are retained by AFDC applicants or recipients. In one group of States, retained direct payments are considered as income to meet need by the IV-A agency, and thus may involve a reduction in the recipient's grant. In a second group of States, IV-D agencies engage in recovery of direct payments, and the AFDC grant remains the same. In order to provide maximum flexibility, we authorize both methods in these instructions. However, to ensure that recovery methods are administered efficiently and that recipients are not subject to duplicate recovery systems, States may implement only one or the other of the two alternative methods. In this context, it should be noted that there is no mechanism under current Federal law or regulation which permits IV-A agencies to either collect assigned child support payments or transfer any recouped assistance payments to IV-D.

In order to accommodate those States which opt for IV-D recovery of direct payments, a change in the IV-A State plan will be necessary. The Office of Family Assistance will therefore issue a change to the IV-A State plan preprint which will require IV-D recovery States to indicate their choice of this option. No IV-A plan amendment will be required for States in which retained direct payments continue to be regarded as income under the IV-A State plan.

The remainder of this Action Transmittal is divided into three sections, numbered II through IV. Section II applies to IV-A and IV-D agencies in all States. Section III, in turn, provides specific instructions which apply only to IV-A income States. Finally, Section IV provides specific instructions which apply only to IV-D recovery States.

II. INSTRUCTIONS FOR ALL STATES

A. *What the IV-A Agency Must Do at Initial Determination of Eligibility When an AFDC Applicant Receives Direct Payments.*

When an applicant for AFDC in any State informs the IV-A eligibility worker at the time of initial determination of eligibility that child support is being received by the family on behalf of an applicant child, the following actions must be carried out by the IV-A agency.

(1) Treat direct payments as income until authorization of the first assistance payment.

The IV-A agency must consider the support payments as income for purposes of determining eligibility. If the family is eligible for assistance, any child support received prior to authorization of the first payment in accordance with the IV-A State plan, must be budgeted as income. The purpose of treating direct payments as income in this initial determination period is to provide sufficient time for the referral of the case to the IV-D agency before child support payments are directed there. In subsequent months, support payments covered by an assignment that are paid to the IV-D agency are not considered as income in computing the amount of the assistance payment to which a recipient is entitled.

(2) Inform the applicant.

In all AFDC cases in which deprivation is due to the absence of a parent from the home, the individual applying for assistance must be informed that support payments received from an absent parent after AFDC is authorized must be paid to the IV-D agency or the applicant's needs can be removed from the grant and payments can be made to the family using the protective or vendor payment provisions of 45 CFR 234.60. This notice is particularly important where a IV-A applicant is receiving support directly at the time of application for AFDC. The IV-A agency must inform the applicant of the exact procedure for turning directly received support payments over to the IV-D agency. This is important because these direct payments must be turned over to the IV-D agency until the IV-D agency can arrange to formally redirect the support payments made by the absent parent from the family to itself. It is advisable that the IV-A agency give the applicant a telephone number of the IV-D agency to be contacted if there is any question about what to do when a direct payment is received. In addition, IV-A agencies in all States must advise applicants who are receiving direct payments that they must inform the IV-D agency whenever there is a lapse in these payments.

(3) Provide notice to IV-D agency.

As required by 45 CFR 235.70, the IV-A agency must, of course, notify the IV-D agency that aid is being furnished with respect to a child "whose eligibility for AFDC is based on continued absence of a parent from the home." In direct payment cases, the IV-A agency must include in this notification any

information it has acquired concerning the direct child support payments the family is receiving.

(4) Make determinations regarding non-cooperation.

Whenever a IV-D agency refers a case involving retained direct payments to the IV-A agency for a determination regarding non-cooperation, the IV-A agency must determine whether the recipient has failed to cooperate as required at 45 CFR 232.12. If a recipient is found to be non-cooperative, the caretaker's needs are removed from the grant and the protective or vendor payment provisions of 45 CFR 234.60 are applied. Although application of this sanction for failure to cooperate results in a net reduction of the recipient family's AFDC grant by the amount which would otherwise be provided to meet the caretaker's needs, the monthly reduction of this amount from the AFDC check has no effect on the debt created by any retained direct payments. This applies to direct payments retained prior to the application of the sanction as well as to direct payments retained during the sanction period.

B. *IV-D Agency Responsibility for Arranging to Have Payments Sent to the IV-D Agency.*

(1) Formally redirect payments to IV-D.

The primary responsibility of the IV-D agency with respect to direct payments cases is to take prompt action to require the absent parent to pay child support to the IV-D agency rather than to the family. When notified by the IV-Agency that a direct payment situation exists, the IV-D agency must proceed immediately to require, in accordance with State law, that the absent parent make support payments to the IV-D agency rather than to the family. This will pre-

vent retention of direct payments by precluding the direct payment from occurring.

(2) Arrange for the recipient to submit direct payments to IV-D.

In cases in which it is not immediately possible for the IV-D agency to formally redirect the child support payments from the family to the agency, it will be necessary to establish interim procedures for the recipient to send direct payments to the IV-D agency. The IV-D agency must inform the IV-A agency about these procedures so that IV-A can carry out its responsibility to explain to applicants and recipients how to handle support payments which are received directly from the absent parent. The IV-D agency should provide a telephone number for recipients to call in the event any questions arise about what to do with direct payments.

III. INSTRUCTIONS FOR IV-A INCOME STATES

The instructions of this section apply only to States in which IV-A agencies regard retained direct payments as income.

A. *IV-A Agency Responsibilities in IV-A Income States.*

When the IV-A agency learns, either at redetermination of eligibility or at any other time after the initial authorization of payment, that a recipient is or has been receiving and retaining direct support payments after the initial authorization of payment, the following actions must be carried out by the agency.

(1) Inform the recipient.

The IV-A agency must remind the recipient who has retained any direct payments of his or her obligation to turn any future direct payments over to the IV-D agency. The recipient should be advised that retaining a future direct payment can result in the removal of the caretaker's needs from the grant and application of the protective or vendor payment provisions of 45 CFR 234.60.

(2) Count current support as income.

The amount of any direct payments received and retained by the recipient in the current month in a IV-A income State must be counted as income, and the amount budgeted accordingly. Despite the assignment under 45 CFR 232.11, the current direct payment is income because it is available to meet the needs of the family when it is retained. Treatment of all retained direct payments as income must continue until one of the following three changes in circumstances occurs:

(a) the recipient begins submitting the direct payments to the IV-D agency as required, or

(b) the IV-D agency succeeds in getting the payments formally redirected; or

(c) the absent parent ceases making payments.

(3) Treat as overpayments direct payments retained in the past.

An overpayment of assistance occurs for each month in which a direct payment is retained by the recipient and not counted by the IV-A agency to reduce the AFDC grant. If permitted by the IV-A State plan,

the IV-A agency should proceed with recoupment in accordance with that plan.

(4) Determine if recipient is cooperative.

Because the recipient may have violated the requirements of 45 CFR 232.12(b)(4) by retaining one or more direct payments, the IV-A agency must proceed to determine if he or she failed to cooperate in obtaining support. Retention of even a single direct payment may be found to constitute an act of non-cooperation which must be sanctioned. If the IV-A agency determines that the recipient did not cooperate, then his/her needs are removed from the grant and a protective or vendor payment made on behalf of the child as required by 45 CFR 232.12(d). At any time the sanction is applied, the notice and hearing requirements of 45 CFR 205.10 must be met.

(5) Restore the cooperative recipient to the grant.

In cases in which the sanction is applied because of failure to cooperate in obtaining support, the caretaker's portion of the grant will be restored when: (1) a demonstrative act of cooperation (in this case, submittal by the recipient of a subsequent direct payment to the IV-D agency) has occurred, or, (2) the circumstance which fostered the act of non-cooperation (in this case the fact that the absent parent does not pay support directly to the IV-D agency) has been resolved (for example, by a change in the court order to require redirection of the support payments from the recipient to the IV-D agency). During the period when the caretaker's needs are removed from the grant, the IV-A agency must continue to budget

any current retained direct payments in accordance with the instructions above.

(6) Respond to notice from IV-D that payments are being retained.

There may be situations in which the IV-A agency does not learn from the applicant or recipient that direct payments are being received and retained, but instead the IV-D agency discovers the situation and notifies the IV-A agency. In this case, the procedures outlined above under IV(A)(1) through (4) would apply. First, the current direct payment must be budgeted as income. Second, direct payments retained in the past which have caused overpayments should be recouped in accordance with the IV-A State plan. Third, the IV-A agency must proceed to determine whether non-cooperation exists under the requirements of 45 C.F.R. 232.12.

B. *IV-D Responsibilities in IV-A Income States*

(1) Contact the recipient in current month.

Although the IV-A agency in the IV-A income State has been instructed above to carry out certain actions when recipients retain direct payments, it may be possible for the IV-D agency in these States to resolve the situation when it first occurs by contacting the recipient to clarify the requirement that direct payments be turned over. Under the instructions of this Action Transmittal, the IV-D agency in a IV-A income State must attempt to contact a recipient in the month in which an expected payment is not received from the recipient in order to ascertain if the recipient received the child support payment and, if so, to clarify the requirements of cooperation and to secure

the release of the direct payment to the IV-D agency. However, after this initial contact with the recipient, the IV-D agency's role in the IV-A income State is limited to reporting the circumstance to the IV-A agency as provided in the next paragraph.

(2) Report to IV-A.

The IV-D agency must report to the IV-A agency whenever it discovers a case in which a direct payment or payments have been retained by a recipient so that the IV-A agency can carry out its responsibilities. The IV-D agency must also report to the IV-A agency whenever a recipient who has been reported as non-cooperative for keeping direct payments begins to cooperate by sending these payments to the IV-D agency as required.

IV. INSTRUCTIONS FOR IV-D RECOVERY STATES

The instructions of this section apply only to States in which IV-D agencies are responsible for recovery of retained direct payments from recipients. Only those direct payments which have not been treated by the IV-A agency as income are subject to IV-D recovery.

A. *IV-D Agency Responsibilities in IV-D Recovery States.*

(1) Discovery and documentation of facts.

When the IV-D agency contacts an absent parent for an apparent failure to pay child support, it may learn that the absent parent has been sending payments directly to the recipient. The first step for the IV-D agency is to document carefully the fact that support

payments have been received and retained by the recipient. This must include a careful review of IV-D records to be certain the recipient did not submit the support payments, as well as obtaining documentation from the absent parent—preferably copies of the cancelled support payment checks themselves—to verify that the absent parent has made support payments directly to the family and to ascertain the total amount retained by the recipient.

(2) Notice to the recipient.

The recipient must be afforded prior written notice that the IV-D agency intends to recover direct payments retained by the recipient. The recipient must be provided the following:

(a) an explanation of the recipient's responsibility to turn over direct payments as a condition of cooperation in obtaining support, as well as the procedure for determining non-cooperation and the sanction for non-cooperation;

(b) a detailed list of the direct payments which the IV-D agency believes have been retained by the recipient, including the dates and amounts of these payments as well as a description of any documentary evidence (such as photocopies of the checks) which the IV-D agency possesses;

(c) an explanation that repaying retained direct payments to the IV-D agency according to a signed repayment plan is a condition of cooperation;

(d) a proposal for a repayment plan between the recipient and the IV-D agency;

(3) IV-D interview with the recipient.

The recipient must be provided the opportunity for an informal meeting with the IV-D agency for the following purposes:

(a) the IV-D agency can explain in detail to the recipient the exact nature and amount of the debt the recipient has incurred with the State by retaining direct payments;

(b) the recipient may review the State's documentary evidence and submit any documentation or other interpretations to challenge any portion of the State's claim against him or her; and

(c) the recipient and the IV-D agency can resolve any inconsistencies and enter into an agreement to repay the amounts retained by the recipient.

(4) The repayment agreement:

The written agreement entered into between the recipient and the IV-D agency should acknowledge the recipient's debt, establish a repayment schedule according to IV-D agency guidelines and be legally enforceable. The repayment schedule must be reasonably related to the recipient's income and resources, including the AFDC grant, and to the size of the debt. The IV-D agency repayment guidelines must be flexible enough to avoid undue hardship when a recipient has very limited income or resources with which to repay the retained child support and also to avoid unreasonably long repayment times in relation to the amount of retained support.

(5) Referral for determination regarding non-cooperation.

If the recipient fails to sign the agreement to repay, the IV-D agency must report all the facts of the case to the IV-A agency for a determination regarding non-cooperation. If the recipient enters into a repayment agreement and then defaults, *i.e.*, fails to make a payment under the terms of the agreement, the IV-D agency must report the matter to the IV-A agency for a determination regarding non-cooperation. This requirement should not be read to mandate referral of the case to the IV-A agency unless the IV-D agency believes that referral is the best way to secure the recipient's compliance with the repayment agreement.

(6) IV-D actions during period when sanction for non-cooperation is in effect.

If a recipient is found by the IV-A agency to be non-cooperative, and the sanction for non-cooperation is consequently applied, the IV-D agency continues to have a responsibility to get current direct payments either formally redirected from the absent parent to the IV-D agency, or sent to the IV-D agency by the recipient. However, if the recipient receives and retains direct payments during the period in which the sanction for non-cooperation is in effect, the IV-A agency is instructed below to count these direct payments as income. Therefore, the IV-D agency is precluded from recovery of any direct payments received and retained by the recipient during the sanction period. Nevertheless, any direct payments which are not counted by the IV-A agency as income (i.e., direct payments received and retained after authorization of the initial AFDC payment but before removal

of the caretaker's needs from the grant and application of the protective payee provisions because of failure to cooperate) constitute a debt owed to the State which is subject to IV-D recovery methods as provided in this Action Transmittal.

(7) IV-D actions if the recipient subsequently signs agreement or makes payment.

If a recipient who fails to sign a repayment agreement with the IV-D agency has been reported to the IV-A agency for a determination regarding non-cooperation, but subsequently consents to sign, the IV-D agency must immediately notify the IV-A agency that the recipient is cooperating as required. If a recipient who fails to make payments consistent with a repayment agreement has been reported to the IV-A agency for a determination regarding non-cooperation, but subsequently begins making regularly scheduled payments as required in the agreement, the IV-D agency must immediately notify the IV-A agency that the recipient is cooperating as required. Regularly scheduled payments cannot include amounts that can be categorized as balloon payments or amounts that would be due as a result of an acceleration clause. These types of provisions are not permitted in any repayment agreements authorized by this action transmittal for as long as an individual remains eligible for AFDC.

(8) Tretament of recovered direct payments.

Any direct payments recovered by a IV-D agency in accordance with these instructions must be distributed as normal child support collections under the requirements of 45 CFR 302.32 and 302.51. These

collections are also subject to the incentive payments provisions of § 302.52.

B. *IV-A Agency Responsibilities in IV-D Recovery States.*

(1) Determine if recipient is cooperative.

When the IV-D agency refers a direct payments case to the IV-A agency for a determination regarding cooperation, the IV-A agency must proceed to determine if the recipient has failed to cooperate in obtaining support according to the requirements of 45 CFR 232.12. In reaching its determination, the IV-A agency must consider both the circumstances surrounding the original retention of the direct payments (e.g., willful withholding vs. agency failure to inform the recipient of the responsibility to turn direct payments over to the IV-D agency) and the recipient's refusal to agree to, or comply with, a repayment schedule.

(2) Apply the sanction for failure to cooperate.

If a recipient is found to be non-cooperative, the penalty for failure to cooperate as provided at 45 CFR 232.12(d) must be applied. This sanction consists of removing the caretakers needs from the grant and providing assistance to the eligible child through the protective or vendor payment provisions of 45 CFR 234.60. Before this sanction is applied, the IV-A agency must meet the notice and hearing requirements of 45 CFR 205.10.

(3) Treat direct payments retained during the sanction period as income.

During the period when the sanction for failure to cooperate is in effect, the IV-A agency must count as

income any direct payments received and retained by the recipient. The IV-D agency has been instructed above that direct payments which are treated as income by the IV-A agency are not subject to IV-D recovery.

(4) Lift the sanction.

In a direct payments case in which the recipient has been found to be non-cooperative because of a failure to agree to the terms of a repayment schedule, cooperation is restored at the point at which the recipient signs the agreement. If the recipient's non-cooperation was caused by a failure to honor the terms of a repayment agreement after having entered into such an agreement, cooperation is restored at the point at which the recipient makes a regularly scheduled payment according to the the terms of that agreement.

INQUIRIES TO: SSA Assistant Regional Commissioners for Family Assistance and OCSE Regional Representatives

/s/ Linda S. McMahon
LINDA MCMAHON
Associate Commissioner
for Family Assistance

/s/ Louis B. Hays
LOUIS B. HAYS
Acting Director
Office of Child Support Enforcement

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